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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 469

CITY OF MURFREESBORO, TENNESSEE,
Petitioner,

v.

RUTHERFORD COUNTY, TENNESSEE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Tennessee

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RUTHERFORD COUNTY, TENNESSEE,
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PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Tennessee.

The City of Murfreesboro, Tennessee, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Tennessee, entered in the above entitled case on July 27, 1959.

CITATIONS TO OPINIONS BELOW.

The opinion of the Chancery Court of Rutherford County, Tennessee (R. 34), is unreported. The opinion of the Supreme Court of Tennessee (R. 127) is not yet officially reported and is unofficially reported, 326 S. W. (2d) 653. Both opinions are printed in Appendix B hereto, infra, p. 25 and p. 31, respectively.

JURISDICTION.

The judgment of the Supreme Court of Tennessee was entered on July 27, 1959 (R. 134, Appendix B, p. 24, infra). No petition for rehearing has been filed and the time for filing such a petition has expired. The jurisdiction of this Court is invoked, under 28 U. S. C., Section 1257 (3), because this cause is based upon a right claimed under a statute of the United States, Tennessee Valley Authority Act of 1933, as amended, 16 U. S. C., Section 831.

QUESTION PRESENTED.

Whether Congress has required that a city pay to a county moneys received by the city's general fund from the city's electric distribution system measured by the equivalent of county ad valorem taxes, when the city purchases its power supply from TVA under a contract which provides that the city's general fund may receive from funds of the electric distribution system a maximum amount in lieu of taxes measured by state, county and municipal ad valorem tax equivalents.

This question was first raised by demurrer to the complaint in the trial court (R. 29); was considered and

decided by that Court (R. 31); was raised in the State Supreme Court (R. 41); and was considered and decided by that Court as "the determinative question" (R. 128).

STATUTE INVOLVED.

The statutory provisions involved are Sections 10 and 13 of the Tennessee Valley Authority Act of 1933, as amended, 16 U. S. C., Section 831 i and 831 l. They are printed in Appendix A, infra, pp. 19 and 20. The language deemed of special pertinence is printed in black face type.

STATEMENT.

Rutherford County, Tennessee on November 17, 1958 filed a Bill of Complaint against the City of Murfreesboro, Tennessee, which operates an electrical distribution system within the City and County, operating as a separate department of the City, designated as the "Murfreesboro Electric Department" (R. 5, et. seq.). The City obtains its wholesale power supply from TVA. On April 23, 1957 the City terminated its then existing wholesale power contract with TVA and entered into a new contract to continue for twenty years from said date (R. 6). The Bill alleges that said power contract between TVA and the City (Petitioner) imposes upon the City a contractual obligation to pay over to the County, in accordance with the alleged requirements of Section 13 of the TVA Act, as amended by Section 39 of the Act of June 26, 1940, 54 Stat. 611, 16 U. S. C., Section 831 l (Appendix A, infra, 21), any amounts collected by the City from the electric system representing tax equivalents or in lieu of tax payments computed or determined on the basis of ad valorem property tax rates of the County. (Complaint, paragraphs IV and V; R. 7-11.)

Section 1 of the contract provides that—

> "Municipality may, as hereinafter provided, receive from the operation thereof (the municipal electric system) for the benefit of its general funds, to be used for any permissible municipal purpose, only an amount in lieu of taxes, representing a fair share of the cost of government properly to be borne by such system" (R. 7).

Section 2 (a) of a "Schedule of Terms and Conditions" which is made a part of the contract provides that—

> ". . . Municipality may take each year from the electric system, in lieu of taxes, an amount representing the fair share of the cost of government properly to be borne that year by its electric distribution system, not to exceed a maximum amount . . . calculated by applying the prevailing municipal, county and State property tax rates to the depreciated original cost of tangible property used in electric operations within the respective taxing jurisdictions at the beginning of each tax year" (R. 8).

Section 2 (b) of the Schedule of Terms and Conditions provides that "it shall be the responsibility of Municipality to provide for such distribution as may be required by law or as it deems appropriate under the provisions of Section 13 of the TVA Act to the State, counties and any other municipal corporations in which it operates of any tax equivalents so collected by Municipality in lieu of State, county and other municipal taxes. If Municipality shall, directly or indirectly, and voluntarily or otherwise, make any payment out of electric system revenues or funds to a county, other municipality, or any other local taxing jurisdiction, in satisfaction of a claim or obligation for taxes or payments in lieu of taxes", the tax equiva-

lents to which the municipality would otherwise be entitled are correspondingly reduced, but not below an amount computed by applying the city's tax rate to the depreciated original cost of the electric system properties within the city (R. 9).

The Complaint further alleged that the City had collected $39,180.51 in lieu of Rutherford County taxes on the municipal electric distribution system for the period April 23, 1957 through July 31, 1958, computed by applying the current Rutherford County tax rates to the value of the electric system properties; that the City had declined the demand of the County to pay over the sum; and that this sum equitably belonged to the County and under Sec. 13 of the TVA Act, as amended, was charged with a trust in the hands of the defendant in favor of complainant. (Complaint, paragraphs VI-VIII; R. 11.) Complainant prayed a judgment in the sum of $39,180.51, plus interest from the date of receipt by the General Fund of the City of the respective monthly payments aggregating this amount.

The defendant demurred on the ground that under the power contract between the City and TVA "and applicable law, including the Tennessee Valley Authority Act of 1933 as amended, complainant has no legal or equitable interest in revenues of the Murfreesboro Electric Department paid into the general fund of the defendant municipality . . ." (R. 29).

The Bill of Complaint and the Demurrer thus squarely raised a controlling Federal question, the County's right under the 1940 amendment to Section 13 of the TVA Act to impress a trust in its favor upon funds in the general treasury of the City representing tax equivalent payments. The decision of the Chancery Court of Rutherford County was rested entirely on this Federal question. Referring to

the statute cited above that Court held that ". . . the congressional purpose is to require municipalities, when they exact county tax equivalents from their electric distribution systems, to restore to the counties the taxes lost" (R. 33). The Chancery Court held further that the County "is entitled to the recovery sought" by the Bill, on the strength of the Federal statute alone. With respect to the City's power contract with TVA the Chancery Court held only that if possible it should be construed consistently with the statute, and that the contract could be so construed (R. 34).

On appeal to the Supreme Court of Tennessee the Court affirmed the decision of the Chancellor, placing its decision on the same Federal ground on which the lower court had relied. "The determinative question in this case," said the Court below, "is the proper construction of the 1940 amendment to Sec. 13 of the TVA Act (16 U. S. C. A., Sec. 831 l)" (R. 128); and the entire decision was rested on its interpretation of said Section 13.

The decree of the Tennessee Supreme Court affirmed the decree of the Chancellor in all things and remanded the cause to the Chancery Court of Rutherford County for further proceedings in accordance with the Court's opinion. On remand the defendant would have the right to file an answer (Tenn. Code Ann. 21-611). However, the defendant has no defenses except those raised on the Demurrer and concedes that its case rests solely upon the claim that Section 13 of the Tennessee Valley Authority Act as amended, does not require the defendant to pay over to Rutherford County the amounts claimed by the County. From the beginning the only issue in the case has been, and is, the proper interpretation of a Federal law, which the Tennessee Supreme Court has decided by its opinion and decree. If the case is remanded to the Chancery Court of Rutherford County, the resulting action would merely

be a mechanical entry of judgment. The decision of the Tennessee Supreme Court, therefore, meets this Court's test of finality. **Pope v. Atlantic Coastline R. Co.**, 345 U. S. 379.

This case is a sequel to an earlier case between the same parties, **Rutherford County v. City of Murfreesboro**, decided by the Supreme Court of Tennessee July 29, 1957, ... Tenn. ..., 304 S. W. (2d) 635. In such earlier case the Supreme Court of Tennessee held that such tax equivalent payments by a city to a county were not required by either Tennessee state law or a contract between the City of Murfreesboro and TVA, substantially identical with the contract involved in the present cause (except that it was entered into prior to the amendment of Section 13 of the TVA Act by the Act of June 26, 1940).

The decision of the Tennessee Supreme Court now challenged was rested entirely on the following language in the 1940 amendment which now constitutes the fourth paragraph (unnumbered) of Section 13 of the Tennessee Valley Authority Act of 1933, as amended, 16 U. S. C., Section 831 l:

> "Nothing herein shall be construed to limit the authority of the Corporation in its contracts for the sale of power to municipalities, to permit or provide for the resale of power at rates which may include an amount to cover tax equivalent payments to the municipality in lieu of State, county and municipal taxes upon any distribution system, or property owned by the municipality, or any agency thereof, conditioned upon a proper distribution by the municipality of any amounts collected by it in lieu of State or county taxes upon any such distribution system or property; it being the intention of Congress that either the municipality or the State in which the municipality is situ-

ated shall provide for the proper distribution to the State and County of any portion of tax equivalent so collected by the municipality in lieu of State or County taxes upon any such distribution system or property."

The Court below held that the foregoing language meant:

". . . that TVA has the discretion in making such contract with municipalities either to include a provision for tax equivalent payments as therein described or to omit any such provision; but if such a provision be included, it must be conditioned upon a proper distribution by the municipality of any such amounts collected in lieu of State or County taxes upon any such distribution system or property" (R. 130).

The Court below further ruled:

". . . that the language 'conditioned upon a **proper** distribution' can only mean that the municipality must distribute these tax equivalents fairly and as a replacement of lost taxes as among the several governmental units; otherwise the municipality would be allowed to make a profit on the operation by collecting these tax equivalents and then retaining all of them for itself" (Emphasis in the original) (R. 132).

The phrase in the statute, "proper distribution", was thus identified by the Court below with the mechanics of the computations under the contract with respect to tax equivalent payments, and the amounts determined by applying the County tax rate to the book value of the electric distribution properties in the County thus became the measure of a "proper distribution".

The administrative interpretation of TVA, which conflicts with the interpretation of the Federal statute by the

Tennessee Supreme Court, as evidenced by the language of the power contract between TVA and the City of Murfreesboro, was dismissed by the Court on the basis that if TVA's interpretation was different "theirs is erroneous", but that the Court "rather believed" that the language of the contract reflected uncertainty in the minds of the TVA officials as to the meaning of the 1940 amendment.

The legislative history of the TVA Act establishing the error of the interpretation by the Tennessee Supreme Court of Section 13, was not referred to in the Court's opinion, although extensively briefed (R. 41 and 80) and argued.

REASONS FOR GRANTING THE WRIT.

1. The Tennessee Supreme Court has decided an important Federal question not heretofore determined by this Court, the right of a County under Section 13 of the TVA Act to a share of municipal tax equivalents received from its electric system by a municipal distributor of TVA power, and has decided such question in conflict with the decision thereof by TVA, the Federal agency charged with administration of the statute involved.

2. The decision of the Court below projects Federal authority into the thorny and controversial area of fiscal relations between the cities and counties of a state, an area primarily local in nature and hitherto considered to be outside the orbit of Federal power or concern. This Court has repeatedly cautioned against interpretations of Federal laws which would project Federal control into areas of legislative authority previously occupied by the states, unless the language of Congress leaves no alternative. **Federal Trade Commission v. Bunte Bros., Inc.**, 312 U. S. 349; **Kirschbaum v. Walling**, 316 U. S. 517.

3. The decision of the Court below preempts for Congress the field of distribution of the tax equivalents of the municipal power systems' purchasing power from TVA and, if not reversed, will result in the invalidation of existing state laws and the exclusion of the states from a future voice in this field.[1]

4. The question presented is of great importance in the administration of the Tennessee Valley Authority Act. TVA has power contracts with 99 cities in six states (TVA Annual Report, 1958, Appendix B, p. A 38), all of them with tax equivalent provisions similar to those in the TVA

[1] In Tennessee the Legislature has refused to approve any legislation of a statewide character, except a statute expressly prohibiting county taxation of municipal electric distribution systems. Tenn. Code Ann. 6-1316. However, in numerous cases the Tennessee Legislature by private acts has provided for local settlements of the tax equivalent problem with respect to municipal distributors of TVA power. Tennessee Private Acts, 1945, Chap. 53, Sec. 1 (Chattanooga); 1939, Chap. 100, Sec. 7 (c) (Knoxville); 1947, Chap. 240, Art. 42, Sec. 26 (d) (Nashville); 1939, Chap. 384, Sec. 19 (Memphis); 1949, Chap. 711, Sec. 1 (Pulaski); 1953, Chap. 455, Art. XXI, Sec. 8 (c) and 1957, Chap. 27 (Sec. 2 (Athens); 1953, Chap. 404, Sec. 2 (Winchester); 1955, Chap. 179, Sec. 8 (Maryville); 1957, Chap. 348, Sec. 12 (Jackson); and 1959, Chap. 405, Sec. 18 (Shelbyville). These measures are based on various distribution formulae, presumably in recognition of significant differences in local situations. In the Chattanooga case, for example, the Legislature specified fixed percentages of total tax equivalents which were to be paid to the respective taxing jurisdictions; in the Knoxville act the payments are to be measured by those a private utility would pay; and in other cities there are still different measures.

In Kentucky, under provisions of the state law, municipal electric systems are required to pay to each taxing district in which they operate a tax equivalent based on applying the respective tax rates to the book value of the property within such jurisdiction and responsibility for administration is placed on the State Department of Revenue. Kentucky Rev. Stats. 96.820. The distribution formula in the Kentucky Statute is the same as that which would be imposed as a matter of Federal law under the decision of the Court below. The state law, of course, would become a dead letter if the counties of Kentucky may claim directly under the TVA Act.

contract with Murfreesboro.[1] An interpretation of the contract which drastically reduces the amounts of money the cities may derive from their electric systems when operating under TVA contracts would be disruptive of the power marketing program of the TVA.

5. Avoidance of a multiplicity of litigation and of impairment of municipal functions in many of the cities purchasing power from TVA requires an early decision of this Court. The decision of the Court below can settle only the liability of the City of Murfreesboro to Rutherford County. Other cities in Tennessee from which counties seek recovery will file their suits in or remove them to the Federal Courts. Unless this Court passes upon the question involved, it must also be litigated in the courts of other states in which there are municipal distribution systems buying power from TVA, Alabama, Mississippi, Virginia and North Carolina or in the Federal courts in these states, or perhaps in both. Equally important, scores of cities will be unable to plan their municipal budgets and service programs, to the extent they depend on tax equivalent payments of the type outlawed by the Court below, until this Court decides the question presented.

6. The decision of the Court below is believed to be in error because (a) it does violence to the language of the Federal statute which it interprets; (b) it disregards legislative history which negatives that interpretation; and (c) it disregards TVA's contrary administrative interpretation. These are discussed in turn.

(a) The **Language of the Statute.** The pertinent paragraph of the 1940 Amendment to Section 13 of the TVA Act (ante, p. 7) begins with the following language:

[1] All power contracts are printed in the TVA Annual Reports, as required by the last paragraph of Section 14 of the TVA Act, 16 U. S. C. Sec. 831*n*.

"Nothing herein shall be construed to limit the authority of the Corporation [conferred by the third proviso to Section 10 of the TVA Act, as amended, 16 U. S. C. 831 i, Appendix A, p. 19] in its contracts for the sale of power to municipalities, to permit or provide for the resale of power at rates which may include an amount to cover tax equivalent payments to the municipality in lieu of State, county and municipal taxes. . . ."

At the outset, therefore, it appears that the whole paragraph was framed by Congress as a clarification of a grant of power to TVA to contract with cities relating to tax equivalent distribution, and not framed as a mandate to the cities. The Congress is entitled to the presumption of having framed the language to reflect its meaning. Moreover, under the foregoing language the rates are to cover tax equivalent payments "to the municipality," not tax equivalent payments to the municipality and the county. The reference to State, county and municipal taxes is merely the measure of the tax equivalents which may be paid "to the municipality." Similar language in the earlier TVA-Murfreesboro power contract was so interpreted by the Court below in **Rutherford County v. Murfreesboro**, 304 S. W. (2d) 635, 638.

Virtually the whole weight of complainant's case rests upon the language "conditioned upon a proper distribution by the municipality of any amount collected by it in lieu of State or county taxes . . ." Considered in context, as a part of a grant of authority to TVA, this obviously means only that TVA is authorized in its contracts with municipalities to condition the right of the municipalities to receive tax equivalent payments upon their agreement to make "proper distribution." The generality of the standard "proper distribution" in itself shows that Congress did not intend a self executing statute in the field

of city-county fiscal relationships, but rather had in mind that further action, by contract or state legislation, would be required before a county could secure any vested right in funds belonging to the municipality.

The concluding clause of the controlling paragraph of section 13 makes unmistakably clear that a county's rights are dependent upon further action by the municipality or the state. It reads:

> ". . . it being the intention of Congress that **either** the municipality **or the state in** which the municipality is situated shall provide for the proper distribution to the state and county . . ." (Emphasis supplied)

If Congress were ordering the cities to make a distribution, it would not provide that the distribution should be made **either** by the municipality or the State. The Court below has written out of the statute the key words "or the state in which the municipality is situated."

(b) **Legislative History.** The legislative history demonstrates that the paragraph of Section 13 upon which complainant relies (quoted ante, p. 7) was not intended to confer any rights on local taxing agencies against cities buying power from TVA, but was intended to be purely admonitory.

First, throughout the entire legislative process, the 1940 amendment was presented and adopted as legislation dealing with the single subject of TVA's own tax replacement obligations. Section 13 of the original TVA Act related solely to TVA payments to the states of Alabama and Tennessee. (Act of May 18, 1933, Section 13, 48 Stat. 58, 66). The construction of projects and acquisition by TVA of properties in other states, the consequent removal of utility properties from the tax base, and other develop-

ing inequities in TVA's tax equivalent payments to the States, made necessary a revision of the tax equivalent payments formula.

(Hearings, Sub-committee of the Senate Committee on Agriculture and Forestry, 76th Congress, 3rd Session, on S. 2925, 1940, pp. 3-5.) A proposed revision was incorporated in S. 2925 and HR 7424, companion bills which were introduced in the First Session of the 76th Congress by Senator George Norris and Representative John Sparkman. S. 2925 passed the Senate on April 30, 1940. The paragraph on which this litigation hinges has no bearing on the major purpose of the legislation to revise the basis for TVA's own tax equivalent payments, and was not in either the House or Senate bill as introduced but was added on the Senate floor. When it was offered on the Senate floor as an amendment by Senator Lister Hill of Alabama there was no discussion on it, much less any suggestion that it was intended to project the Federal government into an entirely new area of Federal regulatory activity and the amendment was agreed to without objection.[1] The amendment was offered and accepted on the evident assumption that it presented no policy or legislative problems worthy of being called to the attention of the Senate.

HR 7424, the House counterpart of S. 2925, was not considered on the floor of the House of Representatives for the reason that the House Committee on Military Affairs, after hearings, voted to table this legislation. (Hearings before the Committee on Military Affairs, House of Representatives, 76th Congress, 3rd Sess., on HR

[1] Senator Hill merely stated that the amendment was agreeable to Senator Norris, who was in charge of the bill on the Senate Floor. Senator Norris confirmed the statement by saying: "Yes; I see no objection to it, and in fact, I think it is a very good amendment." (Cong. Rec., Vol. 86, Part 5, p. 5247, April 30, 1940.)

7424 and other bills to amend the TVA Act of 1933, January and February, 1940.) Thereupon the Senate Appropriations Committee included the language of S. 2925 as previously passed by the Senate, including the amendment offered by Senator Hill, as a rider (Section 39) to the Emergency Relief Appropriations Act, 1941.

Before the Subcommittee of the Committee on Appropriations which was considering the Emergency Relief Appropriation Act, 1941, numerous Senators and Representatives testified in support of inclusion of the language of S. 2925, but not one even mentioned the problem of municipal tax distribution or referred to the paragraph added on this subject. (Hearings before the Senate Committee on Appropriations, 76th Cong., 3rd Sess., on H. J. Res. 544, pages 149-162, May 30, 1940.) The report of the Senate Committee on Appropriations made no reference to the paragraph added by Senator Hill's amendment, but merely described the new section as authorizing "the Tennessee Valley Authority to make payments to certain States and local governments in lieu of taxation from the gross proceeds derived by the Corporation" (Report No. 1754, Calendar No. 1840, Senate Committee on Appropriations, 76th Congress, 3rd Sess., June 5, 1940, p. 9).

The Senate passed the Emergency Relief Appropriations Act, 1941, without any discussion of Section 39 (Cong. Rec., Vol. 86, Part 5, p. 8076, June 12, 1940). When Section 39 of the Emergency Relief Appropriations Act, 1941, was discussed in the House, discussion was confined to tax equivalent payments by TVA itself (Cong. Rec., Vol. 86, Part 8, p. 8868, June 21, 1940). It thus appears that at no stage in the history of this legislation was either House of Congress or any committee apprised that there was any contemplation that the language it was adopting would constitute a mandate to the cities purchasing power from

TVA to make payments to the counties in which they operated electric systems.

Second, the language used in the original version of the bill demonstrates the purely admonitory intent of Congress. As originally introduced S. 2925 did not provide for direct TVA payments to counties such as were later incorporated in the bill. Instead, the original version, which is printed in full in Appendix C, p. 35, stated that "it is the intention of the Congress that each state shall redistribute" the payments made by TVA to the counties and other local taxing districts. When Congress decided to assure itself that the counties would receive the money TVA was required to make the payments directly to the counties. Similarly the fourth paragraph of the bill stated that Congress "intended that each of the said states shall in like manner redistribute all payments made in lieu of taxation paid to municipalities by municipal authorities" under TVA power contracts. When the bill in these paragraphs expressed the Congressional "intention" as to the action which should be taken by the states themselves, it was merely referring the problem to the states for attention. Precisely the same verbal formula was followed in the final version of the bill with respect to municipal redistribution of tax equivalent payments and the same significance is to be attached to the expression of the "intention of the Congress" with respect to the redistribution by the cities of their own money derived from the conduct of their own electric businesses.

Third, this interpretation is confirmed by the Senate hearings on S. 2925, in which Senator Norris, who was conducting the hearings, in the course of colloquies which are quoted in Appendix D, p. 38, made clear that with respect to distribution, while Congress "cannot legislate on that, being a state matter", it could state the "intention of Congress" that the States should provide for such

distribution. This distinction between "legislation", in which Congress would impose its own views on the States, and the expression of an advisory "intention", was followed in the language which became a part of Section 13:

(c) **Administrative Interpretation.** The interpretation of the 1940 amendment to the TVA Act, as determined by the Court below, conflicts with the established interpretation given this Federal Act by TVA, the agency charged with its administration.

One provision of the 1949 amendment, now the last paragraph of Section 13 of the TVA Act, 16 U. S. C. 831 l (Appendix A, p. 23), directs that TVA, not later than January 1, 1945, shall submit to Congress a report on the operation of its provisions. The TVA Board submitted such a report to Congress by letter of transmittal dated December 22, 1944. This Report (the relevant excerpts therefrom printed in Appendix E, p. 41) established TVA's interpretation of the Federal Act to be that in the absence of state legislation or special local agreements to the contrary, the entire tax equivalents may be kept and usually are kept by the municipality operating a system for distribution of electric power supplied by TVA.

The contract between TVA and the City of Murfreesboro discloses the same interpretation by its provision that the entire tax equivalent may be paid into the general fund and used for "any permissible municipal purpose" (R. 48). In the earlier litigation between the parties, **Rutherford County v. City of Murfreesboro**, ... Tenn. ..., 304 S. W. (2d) 635, 638, decided July 29, 1957, the Court below held that payments by the City to the County would not be a "permissible municipal purpose", and hence that the contract precluded such a payment. ~~The present contract, with the same language, was entered into nine months after and in the light of this interpretation.~~

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

.....
ALFRED B. HUDDLESTON,

.....
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APPENDICES TO PETITION FOR CERTIORARI.

City of Murfreesboro, Tennessee v. Rutherford County, Tennessee.

APPENDIX A.

16 U. S. C., Sections 831 i and 831 l, Sections 10 and 13 of the Tennessee Valley Authority Act of 1933, as amended.

831 i. Sale of surplus power; preferences; experimental work; acquisition of existing electric facilities.

The Board is hereby empowered and authorized to sell the surplus power not used in its operations, and for operation of locks and other works generated by it, to States, counties, municipalities, corporations, partnerships, or individuals, according to the policies hereinafter set forth; and to carry out said authority, the Board is authorized to enter into contracts for such sale for a term not exceeding twenty years, and in the sale of such current by the Board it shall give preference to States, counties, municipalities, and cooperative organizations of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members: **Provided,** That all contracts made with private companies or individuals for the sale of power, which power is to be resold for a profit, shall contain a provision authorizing the Board to cancel said contract upon five years' notice in writing, if the Board needs said power to supply the demands of States, counties, or municipalities. In order to promote and encourage the fullest possible use of electric light and power on farms within reasonable distance of any of its transmission lines the Board in its discretion shall have power to construct transmission lines to farms and small villages that are not otherwise supplied with electricity at reasonable rates, and

to make such rules and regulations governing such sale and distribution of such electric power as in its judgment may be just and equitable: **Provided further,** That the Board is hereby authorized and directed to make studies, experiments, and determinations to promote the wider and better use of electric power for agricultural and domestic governments, or their subdivisions or agencies, with educational or research institutions, and with cooperatives or other organizations, in the application of electric power to the fuller and better balanced development of the resources of the region: **Provided further, That the Board is authorized to include in any contract for the sale of power such terms and conditions, including resale rate schedules, and to provide for such rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of this chapter, and in case the purchaser shall fail to comply with any such terms and conditions, or violate any such rules and regulations, said contract may provide that it shall be voidable at the election of the Board: Provided further,** That in order to supply farms and small villages with electric power directly as contemplated by this section, the Board in its discretion shall have power to acquire existing electric facilities used in serving such farms and small villages: **And provided further:** That the terms "States", "counties", and "municipalities" as used in this chapter shall be construed to include the public agencies of any of them unless the context requires a different construction. May 18, 1933, c. 32, Section 10, 48 Stat. 64; Aug. 31, 1935, c. 836, Section 6, 49 Stat. 1076.

§831 l. **Financial assistance to States and local governments in lieu of taxation; apportionment; limitation on contracts for sale of power to municipalities; report to Congress.**

In order to render financial assistance to those States and local governments in which the power operations of

the Corporation are carried on and in which the Corporation has acquired properties previously subject to State and local taxation, the board is authorized and directed to pay to said States, and the counties therein, for each fiscal year, beginning July 1, 1940, the following percentages of the gross proceeds derived from the sale of power by the Corporation for the preceding fiscal year as hereinafter provided, together with such additional amounts as may be payable pursuant to the provisions hereinafter set forth, said payments to constitute a charge against the power operations of the Corporation: For the fiscal year (beginning July 1) 1940, 10 per centum; 1941, 9 per centum; 1942, 8 per centum; 1943, 7½ per centum; 1944, 7 per centum; 1945, 6½ per centum; 1946, 6 per centum; 1947, 5½ per centum; 1948 and each fiscal year thereafter, 5 per centum. "Gross proceeds", as used in this section, is defined as the total gross proceeds derived by the Corporation from the sale of power for the preceding fiscal year, excluding power used by the Corporation or sold or delivered to any other department or agency of the Government of the United States for any purpose other than the resale thereof. The payments herein authorized are in lieu of taxation, and the Corporation, its property, franchises and income, are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision or district thereof.

The payment for each fiscal year shall be apportioned among said States in the following manner: One-half of said payment shall be apportioned by paying to each State the percentage thereof which the gross proceeds of the power sales by the Corporation within said State during the preceding fiscal year bears to the total gross proceeds from all power sales by the Corporation during the preceding fiscal year; the remaining one-half of said payment shall be apportioned by paying to each State the percentage thereof which the book value of the power

property held by the Corporation within said State at the end of the preceding fiscal year bears to the total book value of all such property held by the Corporation on the same date. The book value of power property shall include that portion of the investment allocated or estimated to be allocable to power: **Provided**, That the minimum annual payment to each State (including payments to counties therein) shall not be less than an amount equal to the two-year average of the State and local ad valorem property taxes levied against power property purchased and operated by the Corporation in said State and against that portion of reservoir lands related to dams constructed by or on behalf of the United States Government and held or operated by the Corporation and allocated or estimated to be allocable to power. The said two-year average shall be calculated for the last two tax years during which said property was privately owned and operated or said land was privately owned: **Provided further**, That the minimum annual payment to each State in which the Corporation owns and operates power property (including payments to counties therein) shall not be less than $10,000 in any case: **Provided further**, That the corporation shall pay directly to the respective counties the two-year average of county ad valorem property taxes (including taxes levied by taxing districts within the respective counties) upon power property and reservoir lands allocable to power, determined as above provided, and all payments to any such county within a State shall be deducted from the payment otherwise due to such State under the provisions of this section. The determination of the board of the amounts due hereunder to the respective States and counties shall be final.

The payments above provided shall in each case be made to the State or county in equal monthly installments beginning not later than July 31, 1940.

Nothing herein shall be construed to limit the authority of the Corporation in its contracts for the sale of power to municipalities, to permit or provide for the resale of power at rates which may include an amount to cover tax-equivalent payments to the municipality in lieu of State, county, and municipal taxes upon any distribution system or property owned by the municipality, or any agency thereof, conditioned upon a proper distribution by the municipality of any amounts collected by it in lieu of State or county taxes upon any such distribution system or property; it being the intention of Congress that either the municipality or the State in which the municipality is situated shall provide for the proper distribution to the State and county of any portion of tax equivalent so collected by the municipality in lieu of State or county taxes upon any such distribution system or property.

The Corporation shall, not later than January 1, 1945, submit to the Congress a report on the operation of the provisions of this section, including a statement of the distribution to the various States and counties hereunder; the effect of the operation of the provisions of this section on State and local finances; an appraisal of the benefits of the program of the Corporation to the States and counties receiving payments hereunder, and the effect of such benefits in increasing taxable values within such States and counties; and such other data, information, and recommendations as may be pertinent to future legislation. May 18, 1933, c. 32, Section 13, 48 Stat. 66; June 26, 1940, c. 432, Section 39, 54 Stat. 626.

APPENDIX B.

Decree of Supreme Court of Tennessee, as follows:

Minutes of the Supreme Court of Tennessee at Nashville, Minute Book 44, Page 781.

Rutherford County, v. City of Murfreesboro, Tennessee.	Rutherford Equity. Affirmed and Remanded.

This cause coming on to be heard upon a transcript of the record from the Chancery Court of Rutherford County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the decree of the Chancellor there is no error.

It is therefore ordered and decreed by the Court that the decree of the Chancellor be in all things affirmed and that this cause be remanded to the Chancery Court of Rutherford County for further proceedings in accordance with the Court's opinion, a certified copy of which will accompany the procedendo on the remand; and for the collection of the cost of the Court below; for all of which let procedendo issue.

The cost of this appeal will be paid by the City of Murfreesboro Tennessee, principal; and Alfred B. Huddleston and A. L. Todd, Jr., sureties, for which let execution issue.

7-27-59.

R. 134.

Opinion of the Supreme Court of Tennessee filed July 27, 1959, as follows:

Rutherford County, Appellee,

v.

City of Murfreesboro, Tennessee,
Appellant.

From the Chancery Court of Rutherford County

Hon. Knox Bigham, Chancellor

Affirmed

Opinion Filed July 27, 1959

Alfred B. Huddleston
Murfreesboro, Tennessee

Edwin F. Hunt
Nashville, Tennessee

Howard, Davis, Boult & Hunt
Nashville, Tennessee

Of Counsel for Appellant

Ridley & Bouldin
Murfreesboro, Tennessee

For Appellee

Opinion.

Subsequent to our disposition of a case of the same style as the instant one which is reported in 304 S. W. (2d) 635, which case we decided adversely to the claim of said County, the present bill was filed. The demurrer of the City was overruled by the Chancellor and the suit is here on a discretionary appeal from the decree of the Chancellor.

The determinative question in this case is the proper construction of the 1940 amendment to Sec. 13 of the TVA Act (16 U. S. C. A., Sec. 831 l). This amendment was referred to and urged in support of the County's claim in the prior suit but was properly held to be inapplicable

to the contract existing at that time between the City and TVA which antedated this amendment.

It appears from the bill that, on the 23rd day of April, 1957, the City terminated the contract involved in the prior suit and entered into a new contract to continue for a period of 20 years unless sooner mutually terminated.

Said contract provides in substance that it may place in its general fund to be used for municipal purposes only an amount in lieu of taxes representing a fair share of the cost of government properly to be borne by such system.

Then under the head of "Use of Revenues" after providing for the payment of operating expenses, interest, principal and sinking fund payments, reasonable reserves for renewals, replacements, contingencies and cash working capital, it then provides for **tax equivalent payments** into municipality's general funds, as more particularly provided in an attached schedule of terms and conditions.

Under Condition 2 (b) of said schedule, the material provision is:

> "It shall be the responsibility of Municipality to provide for such distribution as may be required by law or as it deems appropriate under the provisions of Sec. 13 of the TVA Act to the State, counties and other municipal corporations in which it operates of any tax equivalent so collected by Municipality in lieu of State, County and other municipal taxes. * * *"

For the convenience of the reader, we again quote said 1940 amendment as follows:

> "Nothing herein shall be construed to limit the authority of the Corporation in its contracts for the sale of power to municipalities, to permit or provide for the resale of power at rates which may include an amount to cover tax-equivalent payments to the municipality in lieu of State, County and municipal

taxes upon any distribution system or property owned by the municipality, or any agency thereof, **conditioned** upon a **proper** distribution **by the municipality** of any amounts collected by it in lieu of State or county taxes upon any such distribution system or property; it being the intention of Congress that either the municipality or the State in which the municipality is situated shall provide for the **proper** distribution to the State and county of any portion of tax equivalent so collected by the municipality in lieu of State or county taxes upon any such distribution system or property."

The Chancellor in his usual clear style held that under said amendment and the contract above referred to the municipality was obligated to make proper distribution to the County of the tax equivalent payments received by it from the revenues which had gone into its general fund under the provisions of the above quoted instruments.

The only assignment of error is that said bill, contract and applicable law does not entitle said County to any legal or equitable interest in said revenues paid into the general fund of said municipality.

All the argument in support of said assignment revolves around the following three propositions of law appearing in the brief:

"1. Section 10 of the Tennessee Valley Authority Act of 1933 authorizes TVA 'to include in any contract for the sale of power such terms and conditions, including resale rate schedules . . . as in its judgment may be necessary or desirable for carrying out the purposes of this chapter . . .'

U. S. C. A., Section 831 i.

2. The Act of 1940, amendatory of the TVA Act, related only to Section 13 thereof and did not amend

or restrict, nor purport to amend or restrict, Section 10 of the TVA Act.

Act of June 26, 1940, C. 432, Sec. 39;
54 Stat. 626, 16 U. S. C. A., Sec. 831 I.

3. Said amendatory act of 1940 does not require, and may not reasonably be construed to require, that when a city takes from its electric distribution system revenues and places in its general fund an amount in lieu of county taxes, such city must restore to the county the taxes lost.

16 U. S. C. A., Sec. 831 I;
Appendix A attached hereto (Committee Report)."

We think it perfectly clear that the 1940 amendment means, if we may be permitted to paraphrase, that TVA has the discretion in making such contracts with municipalities either to include a provision for tax equivalent payments as therein described or to omit any such provision; but if such a provision be included, it must be conditioned upon a proper distribution by the municipality of any such amounts collected in lieu of State or County taxes upon any such distribution system or property. If this is not the proper construction of that amendment, then it must be said that Congress used quite a good many words unnecessarily and pointlessly; because otherwise, under Sec. 10 of the TVA Act, the Authority had already had unlimited power to include such terms for resale as might be necessary or desirable for carrying out the purposes of the Act.

As we see it, the only discretion is that which is vested in TVA whether to include the provision for payment of tax equivalents, but if such provision be included, it is on condition that the municipality make proper distribution to the respective governmental units. This is made abundantly clear by the language following the semicolon.

A part of the argument in behalf of the City is that such a view constitutes an invasion by the Federal system of the sphere of the rights and powers of the states, thereby raising a serious constitutional question.

We think not. It is true that Congress has absolutely no right to enact a statute, without more, which requires a municipality to make any payments to taxing authorities in which the municipal power system operates, but it does have the power to provide the terms under which a municipality or any other individual or corporation, public or private, may purchase its power for resale purposes, in order that Congress may enable TVA to carry out its purposes, among others, of providing low cost power.

It may be stated this way. No one has a right to purchase power for resale from TVA, but if it is desired to contract with TVA for power it must be upon terms agreeable to TVA that are within the powers granted by Congress and such as are consistent with and directed toward the accomplishment of the overall object of TVA, as expressed in the Acts of Congress.

It would seem odd that, with nothing in the original TVA Act of 1933 purporting to deal with a proper distribution by a municipality of any tax equivalents collected by it in lieu of State and county taxes upon such distribution system, Congress should see fit in 1940 to add this amendment, unless Congress intended to put the State and county in the same category as a municipality with reference to receiving tax equivalent payments in lieu of the lost taxes which would otherwise be assessable and collectible upon privately owned systems. It is a matter of common knowledge that in many counties such tax losses would otherwise be severe.

With this thought in mind, we think that the language "conditioned upon a **proper** distribution" can only mean that the municipality must distribute these tax equivalents

fairly and as a replacement of lost taxes as among the several governmental units; otherwise the municipality would be allowed to make a profit on the operation by collecting these tax equivalents and then retaining all of them for itself.

The Chancellor cited and quoted from Tennessee Valley Authority v. Polk County (C. D. Tenn.), 68 Fed. Supp. 692, not because the case presented the same question of law as in the instant case, but to show the general intent of Congress by this 1940 amendment to replace to the counties the lost taxes; it would be inconsistent to hold at the same time that Congress by this amendment had a different intention where contracts with municipalities are involved.

In behalf of the City it is further argued that Condition 2 (b) of the schedule quoted supra, is an interpretation by the TVA officials in making this contract with the City of Murfreesboro that is contrary to what we have hereinabove stated. If so, we think theirs is erroneous. We rather believe, however, that it is a recognition of the responsibility of the municipality to make the distribution as required by the amendment, and that the words immediately following the opening words of the sentence are generalizations brought about by some uncertainty in the minds of the officials as to the meaning of the part of the 1940 amendment following the semicolon.

Therefore, disagreeing as we do with appellant's Proposition of Law No. 3, we think it evident that the effect of the 1940 amendment to Sec. 13 of the TVA Act by necessity restricted the authority of TVA granted in Sec. 10 of the Act. Elaboration is unnecessary in view of that we have said above.

The decree of the Chancellor is affirmed.

John E. Swepston, J.

(R. 127-133.)

Opinion of the Chancellor filed March 23, 1959, as follows:

Rutherford County

vs.

City of Murfreesboro.

No. 2919.

In Chancery at Murfreesboro.

Opinion.

This case is a sequel to Rutherford County v. City of Murfreesboro, 304 S. W. 2d 635. Since the decision in the former case, the city's contract with TVA has expired and a new contract has been entered into. These facts require a construction of section 13 of the original TVA Act, as amended by the act of June 26, 1940, c. 432, Sec. 39, 54 Stat. 626, 16 U. S. C. A., sec. 831 l. The 1940 amendment, after requiring the TVA to make certain tax equivalent payments to states and counties, goes on to provide as follows:

> "Nothing herein shall be construed to limit the authority of the Corporation in its contracts for the sale of power to municipalities, to permit or provide for the re-sale of power at rates which may include an amount to cover tax equivalent payments to the municipality in lieu of State, county and municipal taxes upon any distribution system or property owned by the municipality, or any agency thereof, conditioned upon a proper distribution by municipality of any amounts collected by it in lieu of State or county taxes upon any such distribution system or property; it being the intention of Congress that either the municipality or the State in which the municipality is situated shall provide for the proper distribution to the state and county of any portion of tax equivalent so collected by the municipality in lieu of State or County taxes upon any such distribution system or property."

In the present contract between the City and TVA is found this provision:

> "It shall be the responsibility of Municipality to provide for such distribution as may be required by law or as deems appropriate under the provisions of section 13 of the TVA Act to the State, counties and any other municipal corporations in which it operates of any tax equivalents so collected by Municipality in lieu of State, county and other municipal taxes."

It is the contention of the complainant county that the 1940 amendment mandatorily requires the City to pay to the County all amounts collected by it in lieu of county taxes. The City contends that the amendment makes no such requirement but that any payment to the county is within the discretion of the State, and if the State fails to act, within the discretion of the City itself. The City argues that Congress expressed an intent not to require such payment but to leave the matter in hands of the State and municipality. The portion of the amendment which requires tax equivalent payments to the states and counties was construed in Tennessee Valley Authority v. Polk County, D. C. Tenn., 68 F. Supp. 692, as follows:

> "According to the tenor of section 13 of the TVA Act the object of the Congress was to render financial assistance to states and local governments in lieu of taxation. This is particularly reflected in the hearings before the appropriate committees which preceded the passing of the 1940 amendment which has become said section 13.
>
> "The plaintiff acquired very valuable power properties and reservoir lands in the Tennessee Valley, which resulted in substantial tax losses to the states and counties in which these properties and lands had been theretofore privately owned. The result of which was particularly burdensome to the counties effected

in their efforts to maintain their schools, other county facilities, and to provide reserve funds and pay interest on indebtedness evidenced by bonds.

"From the provisions of section 13 itself, from a study of the committees' hearings, and a consideration of the remedy sought to be effective by the legislation, I am convinced that, insofar as the counties are concerned, Congress intended to replace to each county the taxes lost on the property acquired by the plaintiff in such county. I think a proper construction of section 13 relative to the rights of the counties will effectuate such intention."

This court is of the opinion that the purpose of the language now under consideration is the same as the purpose of that language construed in the Polk County case. As the purpose of Congress was to require TVA to replace to the county taxes lost by the acquisition of property by TVA, then it follows that the congressional purpose is to require municipalities, when they exact county tax equivalents from their electric distribution systems, to restore to the counties the taxes lost. Congress empowers TVA to enter into such contracts "conditioned upon a proper distribution by the municipality of any amounts collected by it in lieu of . . . County taxes." Congress expressed its intention to be that "either the municipality or the state . . . shall provide for the proper distribution to the . . . county of any portion of tax equivalent so collected by the municipality in lieu of . . . county taxes." The congressional intent is that the county is entitled to the money and that the details and mechanics of its distribution are to be provided for by the local government.

The applicable provision of the contract has been quoted. If possible the contract must be construed so that it will be valid rather than contrary to the law. Carolina Spruce Co. v. Black Mountain Railroad Company, 139 Tenn. 137.

This contract can be construed so that it will square with the law. It results that the county is entitled to the recovery sought by the bill. The demurrer will be overruled and a discretionary appeal will be granted if the city so desires.

Knox Bigham,
Chancellor.

R. 31-36.

APPENDIX C

S. 2925, 76th Cong., 1st Sess.

Be it Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That Section 13 of the Tennessee Valley Authority Act of 1933 be, and the same is hereby, amended to read as follows:

"Sec. 13. In order to render financial assistance to those States and local governments in which the power operations of the Corporation are carried on and in which the Corporation has acquired properties previously subject to State and local taxation, the board is authorized and directed to pay to said States, for each fiscal year, beginning July 1, 1940, the following percentages of the gross proceeds derived from the sale of power by the Corporation for the preceding fiscal year as hereinafter provided, together with such additional amounts as may be payable pursuant to the provisions hereinafter set forth, said payments to be in lieu of taxes and to constitute a charge against the power operations of the Corporation for the fiscal year then beginning and to be made upon condition that no State, county, or local taxes shall be assessed or levied against the property, operations, or business of the Corporation: For the fiscal year (beginning July 1) 1940, 10 per centum; 1941, 9 per centum; 1942, 8 per centum; 1943, 7½ per centum; 1944, 7 per centum; 1945, 6½ per centum; 1946, 6 per centum; 1947, 5½ per centum; 1948 and each fiscal year thereafter, 5 per centum. 'Gross proceeds,' as used in this section, is defined as the total gross proceeds derived by the Corporation from the sale of power for the preceding fiscal year, excluding power used by the Corporation or sold or delivered to any other department or agency of the Government of the United States.

The payment for each fiscal year shall be apportioned among said States in the following manner: One-half of said payment shall be apportioned by paying to each State the percentage thereof which the gross proceeds of the power sales by the Corporation within said State during the preceding fiscal year bears to the total gross proceeds from all power sales by the Corporation during the preceding fiscal year; the remaining one-half of said payment shall be apportioned by paying to each State the percentage thereof which the book value of the power property held by the Corporation within said State at the end of the preceding fiscal year bears to the total book value of all such property held by the Corporation on the same date. The book value of power property shall include that portion of the investment allocated or estimated to be allocable to power: Provided, That the minimum annual payment to each State shall not be less than the two-year average of the State and local ad valorem property taxes levied against power property purchased and operated by the Corporation in said State plus that portion of reservoir lands related to dams constructed by or on behalf of the United States Government and allocated or estimated to be allocable to power. The said two-year average shall be calculated for the last two tax years during which said property was privately owned and operated: Provided Further, That the minimum annual payment to each State in which the Corporation owns and operates power property shall not be less than $10,000 in any case. The determination of the board of the amounts due hereunder to the respective States shall be final.

The payments above provided shall in each case be made to the State not later than July 31 of each year, and it is the intention of the Congress that each State shall redistribute said payments or a portion thereof to counties and other local taxing districts affected by the program of the Corporation.

It is likewise intended that each of the said States shall in like manner redistribute all payments made in lieu of taxation paid to municipalities by municipal authorities as provided in contracts made for the purchase of power from the Corporation.

The Corporation shall, not later than January 1, 1945, submit to the Congress a report on the operation of the provisions of this section, including a statement of the distribution to the various States hereunder and the redistribution by the States of the amounts paid to them; the effect of the operation of the provisions of this section on State and local finances; an appraisal of the benefits of the program of the Corporation to the States receiving payments hereunder and to the local subdivisions thereof, and the effect of such benefits in increasing taxable values within said States and local subdivisions; and such other data, information and recommendations as may be pertinent to future legislation."

APPENDIX D.

Excerpts From Hearing Before a Sub-committee of the Committee on Agriculture and Forestry, United States Senate, Seventy-sixth Congress, Third Session on S. 2925, on February 23, 1950.

"Senator Norris: Mr. Fitts, when the original act was passed and Section 13 was put in as it now stands, and is now the law, it was the real intention of Congress that the amount paid by these municipalities, or rate payers, that they should pay to the municipalities the same as they would pay if they were privately owned in the way of taxes. As a matter of fact, the States under Section 13 have always had the power to subdivide and provide how that should be divided up between the different taxing municipal taxing authorities.

Mr. Fitts: Oh, yes.

Senator Norris: And they have not done it.

Mr. Fitts: That is right.

Senator Norris: That is something that the States have been delinquent in. They have not taken advantage of what this law gave to them as it stands now.

Mr. Fitts: That is correct.

Senator Norris: Therefore, so far as Congress is concerned, we can put out of the picture the amount of the so-called 'tax displacement' that arises from the transfer of these distribution properties, because the State has the power and the means of getting back those taxes that are already being paid. In this bill now pending there is a provision—because the States have not done that in the past—there is a provision here expressing the intention of Congress, and that has always been the intention of Congress.

Mr. Fitts: Correct.

Senator Norris: And while it probably has no legal effect, it rather notifies the States that that is what Congress expects them to do.

Mr. Fitts: It is a policy declaration.

Senator Norris: It is a State matter entirely."

P

"Senator Norris: . . . one of the difficulties that exists right now, as I understand it, and that I think is entirely due to the lack of any State law in any State down there, as far as I know. I thought when the original act was passed that the several States would pass laws that would rectify it - for instance, if they pay into a city, City A, let us say, $100,000 in lieu of taxes, it was the intention of Congress, I take it, when it passed the law, or it was the intention of the T. V. A. when it made the contract to sell the power to that municipality A, that it should really be in lieu of taxes, and, therefore, it should be divided up when it was paid to the city, just the same as though they would have divided it up if it had been privately owned. Some of it would have gone to the State, some to a school district, and some to other subdivisions. But as I understand it, the State never passed any law requiring that division, and the municipality, naturally, keeps it all.

Mr. Lapsley: Yes, sir.

Senator Norris: And the county does not get any of it.

Mr. Lapsley: Nor the State, either.

Senator Norris: Nor the State, either. Now, that is one of the difficulties we wanted to rectify and have put in this bill. **While we cannot legislate on that, being a State matter, we have gone so far as to state in here that it is**

the intention of Congress, which we did not state originally —it is the intention of Congress to do that very thing.

Mr. Lapsley: Well, Mr. Chairman, you state that it is the intention of Congress that the State shall do what I had in mind, but you do not express the intention of Congress that the cities with whom T. V. A. contracts shall do the same thing.

Senator Norris: Oh, yes; the States could provide by statute that when any municipality received anything in lieu of taxation it should be subdivided just the same as though it was taxes—which we cannot say . . ."

P. 33.

APPENDIX E

Excerpts from report on Section 13 of the TVA Act from the Board of Directors of the TVA to the President of the Senate and Speaker of the House of Representatives, December 22, 1944.

Tax and In-Lieu Payments by Local Distribution Systems.

"Although recognized as a part of the TVA regional power development, the municipal and cooperative systems which purchase power from the TVA for resale are locally owned. The electric cooperatives are private corporations and are subject to taxation unless specifically exempted. In Alabama the cooperatives are subject to state and local taxation on a basis comparable with other private business enterprises; in Kentucky and Tennessee they are subject to property and state unemployment compensation taxes only; but in Georgia, Mississippi and North Carolina the electric cooperatives are entirely exempt from state and local taxes except the state unemployment compensation levy. The cooperatives are exempt from federal taxes except the unemployment and old age benefit levies and income levies under certain conditions.

Municipal systems are exempt from federal taxes and from state and local levies in each of the six states affected, although payments in lieu of property taxes are provided for by legislative act in some instances. The power contracts and agreements, through which the TVA exercises its responsibilities for the distribution of electric power, make provision for payments by municipal systems in lieu of state and local property taxes.

These in lieu payments are usually computed by applying the current property tax rates of each jurisdiction to the book value of the electric property within such jurisdictions.

In the absence of state legislation or special local agreements to the contrary the entire state and local ad valorem property tax equivalent of each system is paid into the general fund of the municipality. According to Kentucky legislation enacted in 1942, the power contracts with municipal systems in that state must provide for tax equivalent payments to all the state and local taxing jurisdictions concerned. In Tennessee, the municipal systems of Chattanooga, Knoxville and Nashville pay the equivalent of either current or former county and municipal taxes to the counties and municipalities in which the property is situated. The three county-owned electric systems operating in Tennessee make payments in lieu of ad valorem taxes to each of the local taxing jurisdictions concerned. There are a half dozen other municipal systems that make in-lieu payments to one or more towns and cities in their service area, and one other system that makes a tax equivalent payment to the county" (pp. 24-26).

Effect of Payments by Local Distribution Systems.

"Former ad valorem taxes on property acquired by the 128 municipal and cooperative systems distributing TVA power as of June 30, 1943, amounted to $1,555,000, nearly 18 per cent greater than the comparable figure for TVA acquisitions. Electric distribution property has been acquired by distributor systems in six states, 146 counties, and 285 municipalities; the latter figure includes 24 municipalities which already owned systems prior to TVA service. In contrast to the predominantly rural location of TVA property acquisitions, about 78 per cent of the taxable property acquired by distributor systems was inside municipalities. New property has been constructed by distributors in 21 additional counties and in 64 additional municipalities.

Accruals representing ad valorem taxes on the books of the local distribution systems in 1943 were $1,916,034, or

23 per cent greater than previous taxes on the acquired property. The distribution of these payments is such that in 1943 the municipalities owning systems received $585,385 in excess of former taxes, whereas the payments to counties were $201,866 less than former taxes. . . .

. . . . . .

Taxes paid by cooperatives go to the states, counties, and cities in which the property is located. **On the other hand, the equivalent of the former state and county taxes on municipally owned systems is commonly paid into the general funds of the municipalities owning the systems, and used for various municipal purposes.** As noted above, the aggregate revenue gain over former taxes for owner municipalities was $585,385 in 1943.

Tax and in-lieu payments by the electric distributing systems vary considerably from former taxes. Ten cities each received more than $10,000 annually over former taxes from transfers of tax equivalents by municipal systems to general funds, and a half dozen counties each gained $2,500 or more by increased taxes on cooperative systems. Eight counties each have reductions of over $5,000 annually from former property taxes because of tax exemptions applying to the property of distributor systems. Aggregate local governmental revenues—including municipalities within the counties—were increased by distributor-system payments in 92 counties, and were decreased in 48 counties. Local operation of power distribution facilities in no instance has removed more than two per cent of any local government's revenues, and no detrimental effects on public finance have become apparent" (pp. 40-42). (Emphasis supplied; headings in original; footnotes omitted.)

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No. 469

In the Supreme Court of the United States

OCTOBER TERM, 1959

CITY OF MURFREESBORO, TENNESSEE, PETITIONER

v.

RUTHERFORD COUNTY, TENNESSEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

MEMORANDUM FOR THE TENNESSEE VALLEY AUTHORITY AS AMICUS CURIAE

J. LEE RANKIN,
Solicitor General,
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Washington 25, D. C.

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Knoxville, Tennessee.

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The Tennessee Valley Authority takes no position as to whether the writ should be granted. However, the case does turn on the meaning of certain provisions of Section 13 of the Tennessee Valley Authority Act of 1933, as amended, the administration and interpretation of which are entrusted by Congress to the Board of Directors of the Tennessee Valley Authority. These provisions of Section 13 have had a long history of interpretation by TVA, and it is appropriate that the Court should be advised of this interpretation.

The statutory provision involved is as follows:

> Nothing herein shall be construed to limit the authority of the Corporation in its contracts

> for the sale of power to municipalities, to permit or provide for the resale of power at rates which may include an amount to cover tax-equivalent payments to the municipality in lieu of State, county, and municipal taxes upon any distribution, system or property owned by the municipality, or any agency thereof, conditioned upon a proper distribution by the municipality of any amounts collected by it in lieu of State or county taxes upon any such distribution system or property; it being the intention of Congress that either the municipality or the State in which the municipality is situated shall provide for the proper distribution to the State and county of any portion of tax equivalent so collected by the municipality in lieu of State or county taxes upon any such distribution system or property.

The Tennessee Supreme Court construes this provision as requiring all municipalities contracting with TVA to pay over to the respective counties all tax equivalents collected by the city in lieu of county taxes and as precluding TVA from entering into a contract permitting any other arrangements. This interpretation is contrary to that placed on the Act by TVA. In TVA's view, this provision simply (1) makes clear that Section 13 was not intended by Congress to limit the authority conferred on TVA by Section 10 of the Act "to include in any contract for the sale of power such terms and conditions, including resale rate schedules, and to provide for such rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of this Act," and (2) reaffirms the authority of TVA

to condition the resale rates fixed by it upon a proper distribution by the municipality of any amounts collected in lieu of state or county taxes. Section 13, as reenacted in 1940, provides for tax-equivalent payments by TVA itself to states and counties, but not to municipalities. The legislative history of Section 13 is rather sketchy but Congress apparently intended in the portion of the section quoted above to make clear that the more favored treatment given to counties in respect to TVA tax-equivalent payments was not intended to deprive TVA of the authority to require a proper distribution by municipalities of amounts collected by them in lieu of state or county taxes as a condition of permitting them to charge resale rates sufficiently high to make such distribtuion feasible. Nothing in the Act defines what constitutes a proper distribution or makes it mandatory that rates be conditioned upon any particular form of distribution.

The language beginning "it being the intention of Congress" (*supra*, p. 2) has been consistently construed by TVA as expressing the hope of Congress that either the municipality or the state in which the municipality is situated will provide for the proper distribution of tax equivalents collected in lieu of county taxes, but as recognizing that the proper distribution of tax equivalents is a complex one involving various and sometimes conflicting equities which is appropriately left for solution to the legislatures of the states concerned or, in the absence of state legislative action, to the municipalities themselves. Consistently with this interpretation, TVA has en-

couraged the municipalities to make some distribution of tax equivalents but has never undertaken to make this mandatory or to prescribe a rigid formula for such distribution.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

CHARLES J. MCCARTHY,
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Tennessee Valley Authority.

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v.

RUTHERFORD COUNTY, TENNESSEE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Tennessee.

BRIEF FOR RESPONDENT IN OPPOSITION.

GRANVILLE S. RIDLEY,
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November . , 1959.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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THE CITY OF MURFREESBORO, TENNESSEE,
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On Petition for a Writ of Certiorari to the Supreme Court of Tennessee.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Chancery Court for Rutherford County, Tennessee (App. B to Petition, pp. 31-34) is unreported. The opinion of the Supreme Court of Tennessee (App. B to Petition, pp. 25-30) is reported unofficially at 326 S. W. 2d 653. There was no dissent.

JURISDICTION.

One of the basic jurisdictional requisites to review by writ of certiorari is lacking here. The judgment of the Tennessee Supreme Court is not final, as is required by 28 U. S. C. § 1257. The judgment of the Supreme Court of Tennessee entered on July 27, 1959 merely affirmed the overruling of a demurrer to the bill of complaint (R. 134).

In the State of Tennessee, further defenses may be raised after a demurrer has been overruled. Tenn. Code Ann., § 20-915.

A state court judgment overruling a demurrer normally lacks the requisite finality for review. *Meagher v. Minnesota Thresher Mfg. Co.*, 145 U. S. 608 (1892); *Werner v. City Council of Charleston*, 151 U. S. 360 (1894).

The petitioner may elect to deny the amount claimed is correct, plead laches or estoppel, accord and satisfaction, or make other defense to the bill of complaint.

The bill of complaint also avers that the sums collected by petitioner for which respondent seeks judgment are subject to adjustment at the end of each calendar year (R. 12). The lower court will therefore be required to determine the amount for which judgment is to be entered, even if no further defense is interposed by the petitioner. As a rule, the Supreme Court will not review state court judgments which leave it to the lower court to ascertain an account upon which a decree is to be entered. *California Nat. Bank v. Stateler*, 171 U. S. 447 (1898); *Sand Springs Home v. Naharkey*, 299 U. S. 588 (1936).

Further discretionary action on the part of the lower court is here contemplated, and the judgment is not final so as to permit review by the Supreme Court.

QUESTION PRESENTED.

Whether the petitioner is required by contract with the Tennessee Valley Authority, executed under the provisions of a 1940 amendment to the Tennessee Valley Authority Act of 1933, to distribute to the respondent such part of the payments in lieu of taxes paid to petitioner's general fund by the municipal power distributor as are calculated by application of the prevailing county tax rate to the depreciated value of the distribution system property plus working capital.

STATUTE INVOLVED.

The pertinent provision of the 1940 amendment to the Tennessee Valley Authority Act (54 Stat. 626, 16 U. S. C. A., § 831 l), is set forth in Appendix A to the Petition at page 23.

STATEMENT.

On November 17, 1958, Rutherford County, Tennessee filed its bill of complaint to recover from the City of Murfreesboro, Tennessee, a sum of money in excess of $39,000.00 (R. 5 and 11). The County asserted that these funds represented the county portion of payments in lieu of taxes which were received into the general fund of the City out of the operating revenues of the municipally-owned electric distribution system (R. 11-12).

The total amount of payments in lieu of taxes so received into the City's general fund was calculated by applying the prevailing municipal and county property tax rates to the depreciated value of the distribution system property within the respective taxing jurisdictions, plus working capital (R. 11-12).

The authority to collect such payments in lieu of taxes is embodied in a power re-sale contract between the Tennessee Valley Authority and the City of Murfreesboro entered into on the 23rd day of April, 1957 (R. 6-7). This contract makes it the responsibility of the City ". . . to provide for such distribution as may be required by law or as it deems appropriate under the provisions of section 13 of the TVA Act to the . . . counties . . . of any tax equivalents so collected by Municipality in lieu of . . . county . . . taxes" (R. 9 and 25).

As amended in 1940, Section 13 of the TVA Act thus referred to in the contract places a limitation on the power of the Tennessee Valley Authority to authorize collection of payments in lieu of taxes by requiring that their collection, where permitted, be ". . ., conditioned upon a proper distribution by the municipality of any amounts collected by it in lieu of . . . county taxes upon any such distribution system or property; . . .". 54 Stat. 626, 16 U. S. C., § 831 l (1940).

The City of Murfreesboro has made no distribution of any part of the payments in lieu of taxes collected by it under authority of this contract to Rutherford County (R. 12).

The City, by demurrer to the bill of complaint, asserted that these facts were insufficient in law to entitle the County to any legal or equitable interest in the payments in lieu of taxes for which it sued (R. 29).

The Chancery Court upheld respondent's contention that the demurrer was not well taken and that

> "The congressional intent is that the county is entitled to the money and that the details and mechanics of its distribution are to be provided for by the local government" (App. B to Petition, p. 33).

The Supreme Court of Tennessee affirmed the judgment of the Chancery Court in an opinion from which there was no dissent (App. B to Petition, pp. 25-30).

ARGUMENT.

The issue presented here is of purely local significance. Of the fifty States, and other United States territories, only political subdivisions of those seven states in the TVA area could conceivably be affected by the outcome. One of these states, Kentucky, has already enforced distribution of payments in lieu of taxes by State legislation. Ky. Rev. Stats. 96-820. Existing Kentucky fiscal practices are therefore not affected at all.

Of the remaining states of the TVA area, Georgia is not affected at all, because there is not a single municipal or county distributor purchasing electricity under contract with TVA. *TVA Annual Report*, 1958, Appendix B, pp. A 38-39.

There is only one municipal distributor contracting with TVA in each of the states of Virginia and North Carolina. *TVA Annual Report*, 1958, Appendix B, pp. A 38-39.

In actuality, the issue here is of substantial interest in only three states—Tennessee, Alabama and Mississippi. Of the 90 municipal and county distributors contracting with TVA in these three states, 59 are located within the boundaries of the State of Tennessee. *TVA Annual Report*, 1958, pp. A 38-39. There are thus only thirty-one in the states of Alabama and Mississippi combined.

The issue presented here is manifestly of little concern outside the borders of Tennessee.

No conflict of decision with the decisions of any other court is even asserted by the petitioner, and the conflict with an administrative interpretation which is asserted does not exist. On the basis of the language of the statute and contract in question and the legislative history, the decision of the Chancery Court and the Tennessee Supreme Court was manifestly correct. There is thus no important question of Federal Law requiring decision by this Court.

I.

There Is No Conflict With Any Administrative Interpretation.

Petitioner seeks to persuade the Court that the Tennessee Valley Authority has made an administrative interpretation of the 1940 amendment to the TVA Act with which the decision of the Tennessee Supreme Court is in conflict. The quotations from the Report of the Board of Directors of the TVA to Congress included in Appendix E of the petition, pp. 41-43, are largely relied upon in support of this assertion. This report was not relied upon in either of the Courts below.

These quotations do not purport to recite how TVA interprets the 1940 amendment. Indeed the quoted report does not even mention the 1940 amendment or the section of the TVA Act which it became. It is also safe to assume that had any other report since 1944 made any mention of this 1940 amendment in any fashion that could remotely be regarded as an interpretation or construction, the petitioner would have included it in the petition. The Board simply states what practice has been adopted by most of the municipal distributors in disposing of payments in lieu of taxes. The Board did not, and was not called upon, to make any interpretation.

Nor does the contract between TVA and the City of Murfreesboro represent or establish any administrative interpretation of the 1940 amendment. The contract requires the city to ". . . provide for such distribution as may be required by law or as it deems appropriate under the provisions of Section 13 of the TVA Act . . .". As was pointed out by the Tennessee Supreme Court in its opinion, this language of the contract actually constitutes

> ". . . a recognition of the responsibility of the municipality to make the distribution as required by the amendment, and that the words immediately fol-

lowing the opening words of the sentence are generalizations brought about by some uncertainty in the minds of the officials as to the meaning of the part of the 1940 amendment following the semicolon" (Petition, Appendix B, p. 30).

Even if the 1957 contract was in fact an interpretation, as insisted by petitioner, and contrary to the determination of the courts below, it would be an interpretation of quite recent origin. The issue presented could assume importance only if it presented a conflict between the lower court decision and **a well-established** construction given the statute by the administrative officials charged with its enforcement. See *Patterson v. Lamb*, 329 U. S. 539 (1947).

II.

The Decision Below Is Clearly Correct.

After a penetrating analysis of the language of the 1940 Amendment the Chancery Court concluded with reference thereto that ". . . the congressional purpose is to require municipalities, when they exact county tax equivalents from their electric distribution systems, to restore to the counties the taxes lost" (App. B to Petition, p. 33).

The Supreme Court of Tennnessee, in a clear, concise opinion from which there was no dissent, stated:

> "We think it perfectly clear that the 1940 Amendment means, if we may be permitted to paraphrase, that TVA has the discretion in making such contracts with municipalities either to include a provision for tax equivalent payments as therein described or to omit any such provisions; but if such a provision be included, it must be conditioned upon a proper distribution by the municipality of any such amounts collected in lieu of State or County taxes upon any such distribution system or property" (App. B to Petition, p. 28).

To contend that the proper construction of the 1940 Amendment is contrary to that determined by the courts below is to ignore the plain language of the amendment and its legislative history.

A. The Language of the Statute. The 1940 amendment specifically limits the authority of TVA to include tax equivalent provisions in its power re-sale contracts by stating that the right to include same is ". . . conditioned upon a proper distribution by the municipality of any amounts collected by it in lieu of State or county taxes upon any such distribution system or property." 54 Stat. 626, 16 U. S. C., § 831 l (App. A to Petition, p. 23). To use the language of the Tennessee Supreme Court with reference to the pertinent portion of the 1940 amendment,

> ". . . . the only discretion is that which is vested in TVA whether to include the provision for payment of tax equivalents, but if such provision be included, it is on condition that the municipality make proper distribution to the respective governmental units. This is made abundantly clear by the language following the semicolon" (App. B to Petition, p. 28).

The contention that the provision thus construed below was actually intended only "as a clarification of a grant of power to TVA" and not a limitation thereon is but an exercise in semantics that flies in the teeth of the rules of logic and grammatical construction. For, as the Tennessee Supreme Court observed, to contend as petitioner does

> ". . . it must be said that Congress used a good many words unnecessarily and pointlessly, because . . . under Sec. 10 of the TVA Act, the Authority had already had unlimited power to include such terms for re-sale as might be necessary or desirable for carrying out the purposes of the Act" (App. B to Petition, p. 28).

"Unlimited power" to contract needs no "clarification." The only logical explanation for the pertinent language in the 1940 amendment is therefore that it expressly limits this heretofore "unlimited power."

Petitioner infers that the decision in the former litigation between the parties (Rutherford County v. City of Murfreesboro, 304 S. W. 2d 635) is in some way controlling or persuasive in this case. However, in the former opinion itself the Supreme Court of Tennessee, by adoption of the Chancellor's opinion, specifically stated that the question of the construction of the 1940 amendment could not enter into that decision. At page 639 of the opinion this refusal to construe the 1940 amendment distinctly appears in the following language:

> "If the 1940 amendment has the effect contended for by complainant, it is not merely declaratory of existing law, but materially changes the law as it existed prior to its enactment. Furthermore, by imposing new duties on the city and depriving it of that to which it was previously entitled under the terms of its contract, it impairs the obligation of the contract between the city and T. V. A. Without regard to the constitutional question, the T. V. A. act itself provides that amendments shall not operate to impair the obligation of any contract made by T. V. A. under power conferred by the Act. 16 U. S. C. A., § 831bb."

B. **The Legislative Intent.** Although the language of the 1940 Amendment itself appears clearly and unambiguously to limit TVA contractual power, and thus to make further inquiry as to legislative intent unnecessary; the identical conclusion is reached from a collateral investigation of this congressional intent.

A federal court has been called upon to construe portions of the 1940 Amendment. In the case of *Tennessee Valley*

Authority v. Polk County, 68 F. Supp. 692, 694 (E. D. Tenn. 1945), the court concluded that

> "According to the tenor of section 13 of the TVA Act the object of the Congress was to render financial assistance to states and local governments in lieu of taxation. This is particularly reflected in the hearings before the appropriate committees which preceded the passing of the 1940 Amendment which has become said section 13.
>
> The Plaintiff acquired very valuable power properties and reservoir lands in the Tennessee Valley, which resulted in substantial tax losses to the states and counties in which these properties and lands had been heretofore privately owned. The result of which was particularly burdensome to the counties affected in their efforts to maintain their schools, other county facilities, and to provide reserve funds and pay interest on indebtedness evidenced by bonds.
>
> From the provisions of section 13 itself, from a study of Committees' hearings, and a consideration of the remedy sought to be effected by the legislation, I am convinced that, insofar as the counties are concerned, Congress intended to replace to each county the taxes lost on the property acquired by the plaintiff in such county. I think that a proper construction of section 13 relative to the rights of the counties will effectuate such intention."

For Congress to have intended replacement to counties of lost taxes in one portion of the amendment and something entirely different in another portion would be legislative schizophrenia—yet this is the contention of the petitioner.

The Supreme Court of Tennessee made an incontrovertible delineation of the inconsistency in petitioner's position, stating in its opinion

"The Chancellor cited and quoted from Tennessee Valley Authority v. Polk County (D. C. Tenn.), 68 Fed. Supp. 692, not because the case presented the same question of law as in the instant case, but to show the general intent of Congress by this 1940 amendment to replace to the counties the lost taxes; **it would be inconsistent to hold at the same time that Congress by this amendment had a different intention where contracts with municipalities are involved**" (Emphasis added).

(App. B to Petition, p. 30).

C. **Legislative History.** The legislative history of the amendment demonstrates that the language in question was intended precisely as it was construed below.

As initially proposed, S. 2925, which as modified became the 1940 amendment, did not include the language in question at all (App. C to Petition, p. 37). Had Congress desired to leave TVA unrestricted power with reference to tax equivalent payments, this original language was entirely sufficient. Furthermore had Congress intended a mere pious admonition to the parties concerned to distribute county tax equivalents to the counties, the original language amply sufficed.

However, Congress was not content with this initial language. By amendment offered from the floor of the Senate, this language was altered completely. 86 Cong. Rec. part 5, 5247 (April 30, 1940). This alteration, which replaced the original 41 words of the provision with 151 words, was presumably made for a purpose. That purpose is manifest from a comparison of the original language with the substituted language. Congress was not content to leave distribution of tax equivalents to the discretion of TVA, the states and municipalities.

The record of the Committee hearings on the bill and the debate on the floor does not precisely pinpoint the exact moment or cause of this Congressional afterthought. It appears by strong inference to have resulted from the testimony of a witness from the Alabama State Department of Revenue. This witness pointed out that the cities in Alabama had combined to prevent the passage of state legislation assuring the counties their respective shares of tax equivalents collected from consumers.

> Hearing Before a Sub-committee of the Committee on Agriculture and Forestry, United States Senate, Seventy-sixth Congress. Third Session on S. 2925, February 23, 1940, at pp. 33-34.

This inference is rendered stronger by the fact that the language ultimately adopted was offered by a Senator from Alabama.

III.

There Is No Important Question of Federal Law.

Petitioner insists that serious and far reaching implications of Federal Law are to be perceived in this controversy between one City and one County of the State of Tennessee. Although dire predictions of multiplicitous litigation and disruption of municipal operations are made, there is strangely no citation to any pending litigation, and no reason shown to anticipate a refusal to accept their highest court's decision as determinative on the part of at least the 59 of the municipal distributors which are located in Tennessee. Speculation that some cities in Tennessee will refuse to comply with the holding of the Court below, or that cities in some of the two other states to any degree involved will seek to persuade their courts that the 1940 amendment is meaningless does not make an important Federal question.

Nor does the completely unfounded and unsupported assertion that the TVA marketing program will be dis-

rupted suffice to create a Federal Question, important or otherwise. It is a matter of public knowledge that TVA power output is already insufficient to meet the requests of those groups seeking to purchase current. In the most recent session of Congress the so-called "TVA Self-financing Bill" was enacted, which authorized TVA to issue bonds in order to finance expansion of power production to meet current and anticipated future demands. 73 Stat. 280, 16 U. S. C. A. § 831 n-4. How the TVA could be affected one way or another by requiring the cities to share tax equivalents with counties in equitable fashion does not appear, in the petition or otherwise.

Petitioner apparently now abandons the insistence made below that a serious constitutional question of Federal invasion of state areas of responsibility results from a decision in the respondent's favor. However, Petitioner still pursues its effort to conjure up the spectre of Federal Interference in State areas of legislative authority under somewhat more moderate guise. The argument now runs, that the decision below "projects Federal authority" into state areas and "preempts for Congress the field of distribution of tax equivalents."

Petitioner is merely setting up straw men and urging that they be knocked down. If there has been a projection of Federal authority, it occurred years ago when Congress authorized TVA to exercise control over municipal functions through the device of the power resale contract provisions. In actuality, the conferral of even this broad discretion on TVA did not "project Federal Authority" into state matters, for as the Supreme Court of Tennessee so aptly observed:

> "No one has a right to purchase power for resale from TVA, but if it is desired to contract with TVA for power it must be upon terms agreeable to TVA that are within the powers granted by Congress and

such as are consistent with and directed toward the accomplishment of the overall object of TVA, as expressed in the Acts of Congress."

(App. B to Petition, p. 29.)

The cities then have complete freedom of choice—they can agree or not agree. This is something entirely different from an assertion of Congressional authority over local governmental units.

It is also difficult to see how "preemption", even if it does result, of a field which the States have largely ignored for twenty years can raise a serious Federal question. The one State—Kentucky—which Petitioner asserts has acted in the field will, by Petitioner's own admission, find its fiscal policy unchanged as a result of the decision below. This is hardly the stuff of which serious Federal questions are made.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

G. S. Ridley

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Counsel for Respondent.

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On Petition for a Writ of Certiorari to the Supreme Court of the State of Tennessee.

BRIEF

For the Cities of Johnson City, Tennessee, Elizabethton, Tennessee, and Greeneville, Tennessee, for Amici Curiae.

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BRIEF

For the Cities of Johnson City, Tennessee, Elizabethton, Tennessee, and Greeneville, Tennessee, for Amici Curiae.

This brief amici curiae is filed pursuant to paragraph 4 of Rule 42 for the neighboring Tennessee cities of Johnson City, Elizabethton, and Greeneville, political subdivisions of the State of Tennessee, in support of the petition for certiorari by the City of Murfreesboro, Tennessee. It is sponsored and signed by the authorized law officers of each of the named cities.

All three of the cities operate electric distribution systems, purchasing power at wholesale from Tennessee Valley Authority under long term power contracts. They are now being sued or are threatened with litigation by

the counties in which their municipal electric systems operate under the decision of the Supreme Court of Tennessee in the case of **Rutherford County v. Murfreesboro,** ... Tenn. ..., 326 S. W. (2d) 653, in which the City of Murfreesboro has petitioned this Court for a writ of certiorari. In the case of Johnson City suits have been filed by Washington County and Carter County and is threatened by Sullivan County, despite the fact that payments are made by Johnson City from electric system revenues to Washington County in amounts determined by contract with said county. In the case of Elizabethton suit has been filed by Carter County, and in the case of Greeneville the governing body of Greene County, on October 12, 1959, adopted a resolution authorizing the County Judge to file suit against the city of Greeneville for the collection of additional tax equivalents as may be due (payments in agreed amounts have been made previously) if some settlement is not made within sixty days from said date. Almost all of the State of Tennessee is served with TVA power, for the most part by distribution systems owned and operated by 53 separate municipalities, and the legal situation of the three cities filing this brief is similar to that of two score other cities in Tennessee.

Counsel will not impose upon the Court by duplicating the argument in the petition and brief of the City of Murfreesboro, but will merely amplify the fifth reason by the petitioner for the granting of the writ, which, in the judgment of *amici curiae*, has not been adequately presented by petitioner. The paragraph in question in petitioner's brief (page 11) reads as follows:

> "5. Avoidance of a multiplicity of litigation and of impairment of municipal functions in many of the cities purchasing power from TVA requires an early decision of the liability of the City of Murfreesboro to Rutherford County. Other cities in Tennessee from which counties seek recovery will file their suits

in or remove them to the Federal Courts. Unless this Court passes upon the question involved, it must also be litigated in the courts of other states in which there are municipal distribution systems buying power from TVA—Alabama, Mississippi, Virginia and North Carolina—or in the Federal courts in these states, or perhaps in both. Equally important, scores of cities will be unable to plan their municipal budgets and service programs, to the extent they depend on tax equivalent payments of the type outlawed by the Court below, until this Court decides the question presented."

The tax equivalent payments of the municipal electric systems to the general funds of the respective cities are a major source of the revenues required to carry on their functions. The precise impact upon the municipalities of Tennessee as a whole or upon the individual distributors cannot be determined from sources of which this Court may take judicial notice, but the general magnitude of the problem is plain from the figures given in TVA's Annual Reports. In the Annual Report for 1958 TVA reported that for the fiscal year 1958 the 150 distributors paid a total of about $8,500,000 in state and local taxes and tax equivalents. The municipal systems accounted for more than three-fourths of the combined revenues of 80.7 million dollars for all municipal and cooperative distributors (Table 3, pages A-38-A-40); and among the 99 municipal systems (excluding Memphis, which is no longer a distributor of TVA power) 53, including many of the largest, are in Tennessee (Table 3, *supra*).

Another indication of the magnitude of the problem as it confronts Tennessee municipalities may be derived from the combined financial statements for the fiscal year 1958 appearing on page 60 of the TVA Annual Report for 1958. This statement shows that the 99 municipal systems had a total depreciated plant investment as of June 30, 1958 of

$392,000,000. Under the TVA contract this entire investment, plus materials and supplies, was subject to tax equivalent payments based on the application of the full city, state and county tax rates. The municipal tax equivalent base upon which counties could claim payments would, therefore, be in the order of $400,000,000, a good deal more than half of it in Tennessee.

In the counties in which Johnson City, Elizabethton and Greeneville operate the 1958 county tax rates are as follows:

Washington	$3.80
Carter	5.86
Sullivan	2.82
Greene	3.00

The tax rate in Greeneville is now $3.00, the maximum allowed by its charter.

Acute embarrassment to municipal administration is created by uncertainty as to the validity of a major source of municipal revenue. Even if consideration of the problem is limited to the tax equivalent for a single tax year it is apparent that the cities which have relied on the full tax equivalents permitted by the TVA Act and the TVA contract, as interpreted by the TVA, must either find new tax sources, raise their tax rates, or reduce the level of municipal services at a time when more and more demands are being made upon the cities for expansion of such services.

If the validity of the interpretation of Section 13 of the TVA Act which was reached by the Court below were sustained by this Court the cities would perforce face this hard choice and attempt to find the solution which involved the least sacrifice of the public welfare. Convinced as they are that the decision is wrong for the reasons set forth in the petition of the City of Murfreesboro for writ of certiorari (pages 11-17), to institute new taxes or to raise the level of tax rates or to curtail already inadequate municipal

services would impose great and needless hardship upon the citizens of many of the cities of Tennessee.

The plight of the cities of Tennessee is greatly aggravated by the question of retroactivity of the decision of the Court below. In the earlier controversy between Rutherford County and the City of Murfreesboro the Supreme Court of Tennessee held that counties could not claim tax equivalents from cities which purchased power under power contracts with TVA executed before June 26, 1940, the effective date on which Section 13 was amended by adding the language upon which Rutherford County relies. **Rutherford County v. Murfreesboro**, 304 S. W. (2d) 635. The contract between TVA and Murfreesboro upon which the present suit is based was executed on April 23, 1957 (R. 6), and suit was brought on November 17, 1958. The City of Murfreesboro, therefore, has far less exposure to liability for back payments than many other cities. For those cities which entered into contracts shortly after June 26, 1940 there would now be nineteen years of exposure to claims by counties for failure to pay over amounts due to the counties under the provisions of the amended section 13, despite the fact that there was no basis for suspecting liability until the decision of this Court in the present case on July 27, 1959, and that TVA's consistent administrative interpretation of Section 13 of the TVA Act as amended by the act of June 26, 1940 was that the cities were under no obligation thereunder to make payments to counties (Petition, p. 17, and Appendix E; Memorandum for the Tennessee Valley Authority as Amicus Curiae, pp. 3 and 4).

In the case of the amici curiae the dates of the respective contracts are as follows:

Greeneville, March 30, 1945 (superseded by a new contract as of July 1, 1949);
Johnson City, March 2, 1945;
Elizabethton, August 3, 1944.

Whether any Tennessee statute of limitation applies, and, if so, which one, is not clear. The rule in Tennessee is that general statutes of limitation do not apply to subdivisions of the state with respect to their sovereign capacity, but do apply with respect to claims based upon their corporate or private capacity, in which only its local citizens are interested and not all the people of the state; thus, the general statutes of limitation do not apply to taxes, but do apply to special assessments: **City of Knoxville v. Gervin**, 169 Tenn. 532, 89 S. W. 348; **Shelby County v. Bickford**, 102 Tenn. 395, 52 S. W. 772; **Hamblin County v. Cain**, 115 Tenn. 279, 89 S. W. 103. Delinquent state, county, school and municipal property taxes are subject to a specific six-year limitation (Tenn. Code Ann., Sec. 67-1323). Whether a claim under Section 13 of the TVA Act for amounts in lieu of taxes would be covered by the tax limitation, or by any of the general statutes of limitation, remains to be determined. Assuming that a statute of limitation would bar a county's claim against a city based upon Section 13 of the TVA Act, it would remain to be decided whether the claim would be barred after six years under the tax limitation (Tenn. Code Ann., Sec. 67-1323) or the limitation in cases of actions on contracts other than those otherwise specifically provided for (Tenn. Code Ann., Sec. 28-309), or after ten years, the limitation for "all other cases not expressly provided for" (Tenn. Code Ann., 28-310). Any of these statutes may apply or none of them; and until final decision by this Court on the obligation of cities to make payments to counties under the provisions of Section 13, there hangs over the officials and citizens of the Tennessee Valley Authority municipal power distributors a contingent liability so large as to threaten their solvency.

CONCLUSION.

Almost every city in Tennessee has a profound interest in this cause. An early decision of the legal question raised by the City of Murfreesboro would avoid serious obstruction to the administration of municipal affairs throughout the State of Tennessee. For this reason we respectfully urge the Court to grant the petition of the City of Murfreesboro for a writ of certiorari.

Respectfully submitted,

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